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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 775

FREDERIC W. PROCTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original memorandum opinion of the Tax Court of the United States (R. 56–64) was entered July 6, 1943, and is unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit reversing that decision and remanding the case to the Tax Court, filed April 11, 1944, and its *per curiam* opinion on rehearing, filed May 31, 1944 (R. 1–9), are reported in 142 F. 2d 824, 828, certiorari denied, 323 U. S. 756. The memorandum opinion of the Tax Court on remand (R. 74–80) was entered March 31, 1945,

and is unreported. The opinion of the United States Circuit Court of Appeals affirming that decision (R. 91–94), filed October 30, 1945, is reported in 151 F. 2d 603.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945. (R. 95.) The petition for a writ of certiorari was filed January 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's gift to his children of his remainder interests in two trusts created by his grandfather was incapable of valuation and therefore exempt from gift tax.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible

or intangible; * * * The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

STATEMENT

On January 13, 1939, the petitioner, Frederic W. Procter, made a gift in trust to his surviving children or the issue and widows of any children predeceasing him of so much of his future right, title, and interest in each of two trusts which had been established by his grandfather as would remain after the payment of a debt owed to his mother of $686,300.03 (R. 23–32). The petitioner reserved a life interest in the trusts he had created (R. 24). On the date of the transfer in question the petitioner was 36 years of age and his mother 63 (R. 57). One of the trusts created by petitioner's grandfather was an *inter vivos* trust (R. 32–37); the other was testamentary (R. 37–39). Under the terms of the *inter vivos* trust, valued at $928,593.70 at the date of the gift, the petitioner was to receive the corpus thereof upon the death of his mother, the life tenant, if he survived her.[1] Under the terms of the testamentary trust, valued at $961,552.68 at the date of the gift, he was to receive the corpus

[1] His share was subject to theoretical diminution if his mother should have other children who might survive her. However, since she was 63 years old at the time of this transfer, that contingency has never been regarded as an element in this case.

thereof upon the death of his mother if he reached the age of 40 and survived her. (R. 57.)

On the original hearing the Tax Court held that, since the petitioner's debt to his mother was payable on demand it should be deducted from the value of the petitioner's interests in the corpora of the trusts his grandfather had created at the date the taxpayer made the gift (R. 63). The court below agreed with the Tax Court in this respect (R. 3), but reversed its decision to the effect that the gift had no value, because in its view the Tax Court had misapplied certain stipulated actuarial factors and had thus determined the value of the petitioner's interests in the trusts at the date of the gift not with reference to his mother's death, when he would become entitled thereto, but with reference to his own death, when his children would receive the economic benefits thereof (R. 4). The court below therefore remanded the case to the Tax Court for further proceedings not inconsistent with its opinion (R. 7); that is, to determine the amount of the tax by the use of a formula which the court below explained and which involved the application of what it regarded as the proper criteria in its determination.

The court below also rejected the petitoner's contention that the Tax Court's decision should be affirmed on the ground, among others, that the interests of the petitioner in the trusts his grandfather had created were of too contingent a char-

acter to be valued for gift tax purposes (R. 5), and thereafter denied a petition for a rehearing in which the petitioner had again contended that the gift was incapable of valuation because it was of contingent remainders (R. 9).

Thereafter this Court denied the taxpayer's petition for certiorari to review the decision of the court below reversing and remanding the case to the Tax Court, 323 U. S. 756. The petition was based on the ground, among others, that the gift was without computable or ascertainable value and was therefore not subject to tax. See petition for certiorari, No. 376, October Term, 1944, p. 7. Furthermore, as a reason for granting the writ, the petitioner alleged that the decision of the court below was in direct conflict in that regard with the decision of this Court in *Robinette* v. *Helvering*, 318 U. S. 184. (*Ibid.*)

Upon the hearing on remand, the Tax Court computed the value of the gift in accordance with the mandate of the court below, again rejecting the petitioner's contention that the gift was incapable of valuation. The court below thereupon affirmed the Tax Court's decision, also again rejecting the taxpayer's contention that the gift was incapable of valuation. (R. 94.)

ARGUMENT

In his present petition for certiorari, the petitioner has merely renewed the contention made in his former petition which this Court denied

(323 U. S. 756), namely that his gift of the remainder interests in the two trusts was incapable of valuation and therefore had no value for federal gift tax purposes, and that, accordingly, the decision of the court below is in conflict with *Robinette* v. *Helvering,* 318 U. S. 184. The present petition merely assumes, contrary to the finding of both the Tax Court and the court below, that the gift cannot be valued. See, e. g., the question which the petitioner says is here presented. (Pet. 6.)

This assumption is based upon two considerations: first, that the petitioner's mother might die leaving a child or children other than the petitioner; and second, that his mother might foreclose "on his $686,300.03 notes in her lifetime." (Pet. 4.)

(a) Under the *inter vivos* trust, petitioner's remainder was subject to diminution in the event that his mother died leaving other children, who would share in the remainder with petitioner. (R. 33.) No such provision was contained in the testamentary trust, under which the petitioner was to take the entire corpus if he survived his mother and reached forty years of age. (R. 38.)

As to petitioner's remainder in the latter trust, the court below correctly held that since the contingent remainders of other beneficiaries would fall in only if petitioner's remainder failed, that is, in the event that he died before his mother, the

value of these other remainders was irrelevant. (R. 94.) The contingency that petitioner's mother might predecease him had already been taken into account in determining the value of the gift, since the value of the corpus of the trust had been discounted by means of actuarial factors which had been stipulated.

The court below evidently considered the same reasoning applicable to the *inter vivos* trust. The contingency that petitioner's mother might have other children who would reduce petitioner's share was properly ignored in the circumstances of this case. Petitioner did not argue in either of the courts below that the *inter vivos* trust was to be treated differently from the testamentary trust by reason of this consideration, and the parties as well as both courts below have at all times treated this trust as one in which the petitioner would receive the entire corpus in the event that he survived his mother. Moreover, since his mother was 63 years of age at the time of petitioner's gift, such a remote contingency could properly be ignored. Cf. *City Bank Farmers' Trust Co.* v. *United States*, 74 F. 2d 692 (C. C. A. 2d). Indeed, under *Robinette* v. *Helvering*, 318 U. S. 184, upon which the petitioner relies, it is plain that the amount of the taxable gift is not to be diminished on account of any such remote and unascertainable contingency.

(b) Petitioner's contention that the gift cannot be valued because of the uncertainty as to

when or whether his mother might foreclose on the property to enforce her claim of $686,300.03 is a mere quibble. To be sure, it may be impossible to know when or whether his mother might seek enforcement of her claim. But, in determining the value of the gift, the Tax Court and the court below made the assumption *most* favorable to the taxpayer, namely, that his mother might proceed at once; and in computing the taxable gift, the amount of her claim was therefore subtracted in full in computing the value of petitioner's gifts.

CONCLUSION

This Court has already refused to review this case, and the present petition presents no additional reasons of substance for review. The petition should be denied.

Respectfully submitted.

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FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946